IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 807

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant,

v.

STATE OF TEXAS ET AL., *Appellees.*

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS.

APPELLANT'S BRIEF OPPOSING APPELLEES' MOTION TO DISMISS

To the Honorable Supreme Court of the United States:

April 12, 1937, appellant, United Gas Public Service Company, received by mail notice of appellees' intention to file, pursuant to Rule 7, paragraph 3 (U. S. Sup.),[1] motion to dismiss this appeal, together with a printed undated copy of the motion.

Appellant files this brief opposing appellees' motion pursuant to paragraph 3 of the above Rule.

[1]Three sets of court rules will be referred to in this brief. The Rules of the Supreme Court of the United States will be identified by the abbreviation (U. S. Sup.), the rules of the Supreme Court of Texas by the abbreviation (Tex. Sup.), and the rules prescribed by the Supreme Court of Texas for the Courts of Civil Appeals of Texas by the abbreviation (Tex. CCA).

Matters Not In Dispute.

As appellees assert, this is an appeal from a judgment of the Court of Civil Appeals, Third District, Texas. The record, filed in this Court March 12, 1937, affirmatively shows that the appeal was taken after all means of possible further appellate review in the state courts had been exhausted, appellant's application for writ of error having been refused and motion for rehearing thereof having been denied by the highest state court, the Supreme Court of Texas. On December 30, 1936, the date the State Supreme Court overruled said motion for rehearing, the record was returned to the Court of Civil Appeals. The judgment of the Court of Civil Appeals then became final in the courts of the State, and thereupon the Court of Civil Appeals was empowered to issue mandate immediately.

Appellant duly sought allowance of this appeal and an order superseding the judgment from the Chief Justice of the Court of Civil Appeals. He declined to allow the appeal. The appeal was allowed (January 16, 1937), and, after notice to appellees, an injunction restraining enforcement of the rate and refund order was granted (January 21, 1937) by Mr. Justice Cardozo. Service was completed under Rule 12, paragraph 2 (U. S. Sup.) on January 19, 1937. Appellees filed no statement or motion pursuant to paragraph 3 of said Rule. The Court noted probable jurisdiction April 5, 1937. The only part of the record which has been printed and distributed to counsel is appellant's jurisdictional statement.[2]

[2]The record references in this brief are to the typed transcript of record, comprising 1104 pages, finally certified by R. E. Moore, Clerk of the Court of Civil Appeals, on March 5, 1937.

Summary Statement of the Authority Upon Which the Appeal Was Taken.

This appeal was not taken from the Supreme Court of Texas, which, in the exercise of a discretionary right to do so, had refused to grant writ of error and to review the judgment of the Court of Civil Appeals, but was taken from the Court of Civil Appeals after the judgment of that Court was no longer susceptible of further appellate review in the state courts, and at a time when the mandate of said intermediate appellate court was ripe for issuance, because (1) Such has been the established practice in Texas for more than forty years, as reflected by a long line of decisions of this Court.[3] (2) The record made by the Supreme Court of

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[3]The following decisions of this Court were upon error to or appeal from one of the Courts of Civil Appeals of Texas (which courts were created in 1892), after the Supreme Court of Texas had: (1) refused application for writ of error, Stanley v. Schwalby (1896) 162 U. S. 255; Bacon v. Texas (1896) 163 U. S. 207; Waters-Pierce Oil Co. v. Texas (1900) 177 U. S. 28; National Cotton Oil Co. v. Texas (1905) 197 U. S. 115; Waters-Pierce Oil Co. v. Texas (No. 1) (1909) 212 U. S. 86; T. & N. O. R. R. Co. v. Sabine Tram Co. (1913) 227 U. S. 111; St. L. & San Francisco Ry. v. Seale (1913) 229 U. S. 156; San Antonio Ry. v. Wagner (1916) 241 U. S. 476; Missouri Kans. & Tex. Ry. Co. v. Texas (1918) 245 U. S. 484; Internat'l & G. N. Ry. Co. v. Anderson Co. (1918) 246 U. S. 424; Zucht v. King (1922) 260 U. S. 174 (subsequently dismissed for lack of a substantial federal question); Barwise v. Sheppard (1936) 299 U. S. 33; (2) dismissed application for writ of error (No search made for cases where application was dismissed because not presented as required by state law), Sullivan v. Texas (1908) 207 U. S. 416; Bain Peanut Co. v. Pinson (1931) 282 U. S. 499.

Since December 11, 1918 (Gammel Statesman Pub. Co. v. Ben C. Jones & Co., decided Dec. 11, 1918, see appellees' motion, pp. 6-7), review by this Court of a judgment of a Texas Court of Appeals has been sought in at least 93 cases (248-298 U. S.). In 64 of these review was sought by petition for writ of certiorari, 54 petitions being dismissed or denied and 10 being granted, including the following: So. Pac. Co. v. Berkshire, etc. (1919) 250 U. S. 638; Western Union Teleg. Co. v. Southwick (1920) 251

Texas in refusing writ of error to the Court of Civil Appeals will not support an appeal to this Court, as it does not appear from the face of such record that the refusal to grant writ of error was an exercise by the State Supreme Court of its jurisdiction to review the case on its merits, a showing of affirmance in express terms of the judgment of the Court of Civil Appeals being entirely lacking.[4] (3) Viewed purely as a question of state law, when writ of error to a Texas Court of Civil Appeals is refused by the Supreme Court of Texas in a case which the latter court has the discretionary right to review, the power exercised is the power to limit the jurisdiction of the highest state court. The judgment of the Court of Civil Appeals then becomes final in the Texas courts because the State Supreme Court has declined jurisdiction and the State of Texas has provided no further appellate review. The jurisdiction of the Supreme Court of Texas to decide the case and enter its judgment therein never attached.[5] (4) In this case,

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[3] (*Continued*)
U. S. 549; City Nat. Bk. v. El Paso & Northeastern R. R. Co. et al (1922) 258 U. S. 616; M-K-T R. R. Co. of Texas v. State (1928) 271 U. S. 653; M-K-T R. R. Co. v. King (1926) 273 U. S. 680; Danciger & Emerich Oil Co. v. Smith (1927) 274 U. S. 733; Texas & Pac. R. Co. v. Guidry (1929) 280 U. S. 538. No refusal or dismissal was noted upon the ground that certiorari should have been to the Supreme Court of Texas.

[4] Norfolk Turnpike Co. v. Virginia (1912) 225 U. S. 264, 269; Louisiana Nav. Co. v. Oyster Commission (1912) 226 U. S. 99, 101; St. L. & San Francisco Ry. v. Seale (1913), 229 U. S. 156, 157; Royster Guano Co. v. Virginia (1920) 253 U. S. 412, 413; Western Union v. Priester (1928) 276 U. S. 252, 258; Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, sec. 48, pp. 83-85.

[5] Art. V, sec. 2, Constitution of Texas; San Antonio & A. P. Ry. v. Blair (1917) 108 Tex. 434; 437-441; Gatz v. City of Kerrville (1931) 121 Tex. 92, 93; Articles 1739, 1750, 1766-1767,

the Court of Civil Appeals was possessed of the record from the day the Supreme Court of Texas finally declined to take jurisdiction. The judgment of the Court of Civil Appeals, not being susceptible of further state appellate review, was final in the courts of Texas, and was ready for immediate enforcement by mandate, which mandate only the Court of Civil Appeals had power to issue. Injunction pending this appeal was essential to protect appellant's rights. The mandate of the Court of Civil Appeals to enforce its judgment was the means by which appellees could impair those rights, unless restrained. (See last footnote above).

One Question Asserted by Appellees' Motion.

The only question sought to be raised by appellees' motion is that, viewed purely as a question of state law, the refusal of the writ of error to the Court of Civil Appeals constituted a judgment of the Supreme Court of Texas affirming without opinion the judgment of the Court of Civil Appeals. Appellees completely ignore and make no showing in respect of what appears upon the face of the record. They ask this court to go behind the record, resort to and adopt their construction of the state law, and upon doing so, to dismiss the appeal. As we view it, this is the sole ground of the motion. We submit that appellees have not presented a tenable ground for dismissing this appeal.

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[5] (*Continued*)
1771, 1773, 1777, 1780, 1800a, sec. 5, 1864, 1867, 1881, 1883, Revised Civil Statutes of Texas, 1925; Rules 2-8, 13, 19, Supreme Court of Texas, 121 Texas 747-752; Rule 66, Courts of Civil Appeals, Texas, 102 Tex. xxxvi.

Appellees Present No Tenable Ground for Dismissal.

In *Norfolk Turnpike Co. v. Virginia* (1912), 225 U. S. 264, 269, the Court declared the rule to be applied thereafter when the highest state court had declined, by refusal of writ of error or appeal, to review the judgment of a lower court. This rule was announced for the guidance of suitors, to be applied from and after the next (October 1912) term of this court. The rule is that where a writ of error (now appeal) is prosecuted to this Court from an alleged judgment or decree of the highest state court declining writ of error to or appeal from the judgment of a court below, this Court will dismiss the appeal, unless it plainly appears, on the face of the record, by an affirmance in express terms of the judgment below, that the refusal by the highest state court was an exercise by it of jurisdiction to review the case upon the merits (225 U. S. at p. 269).

The opinion in the *Norfolk Turnpike case, supra* is by Mr. Chief Justice White, and may be read in connection with his opinion in *Louisiana Nav. Co. v. Oyster Commission* (1912), 226 U. S. 99, 101. Chief Justice White then had before him a record from the Supreme Court of Louisiana, his own State. On the face of the record, the judgment of the state court was not final. It was contended that if this Court would look behind the face of the record and resort to the state law, it would then appear that the judgment, though not final in form, was final in its result, because it practically disposed of the rights of the parties. The Court dismissed the writ, holding that the form of the judgment as shown by the face of the record was controlling. The court said that the confusion and contradiction inevitably arising when

the Court is required to look beyond the face of the record and to resort to the state law, was the dominating reason for the principle that the form of a judgment controls in determining its finality. The citation of the Norfolk Turnpike case (at 226 U. S. 101) affirms the purpose of the Court to provide a definite test for suitors so as to dispel future doubt as to what constitutes the state judgment appealable under the federal statute (225 U. S. at p. 269).

For many years before the Norfolk Turnpike case, this Court had held that when the Supreme Court of Texas denied writ of error, it thereby prevented a review by it of the judgment of the Court of Civil Appeals, and hence the review in this Court was on error to the Court of Civil Appeals which had rendered the judgment, and not to the highest state court which had refused to review that judgment, *Stanley v. Schwalby* (1896), 162 U. S. 255, 269; *Bacon v. Texas* (1896), 163 U. S. 207, 215, 216. See also *Waters-Pierce Oil Company v. Texas* (1900), 177 U. S. 28, 41; *National Cotton Oil Co. v. Texas* (1905), 197 U. S. 115, 118; *Waters-Pierce Oil Co. v. Texas* (No. 1) (1909), 212 U. S. 86, 97; and *Sullivan v. Texas* (1908), 207 U. S. 416, 422, all upon error to a Texas Court of Civil Appeals after the Supreme Court of Texas had declined writ of error. In *St. L. & San Francisco Ry. v. Seale* (1913), 229 U. S. 156, 157, motion to dismiss error to the Court of Civil Appeals after the Supreme Court of Texas had refused writ of error was denied, citing *Bacon v. Texas* and the *Norfolk Turnpike case, supra.*

The rule of the Norfolk Turnpike case has been followed by the Court, *Royster Guano Co. v. Virginia*

(1920), 253 U. S. 412, 413; *Western Union v. Priester* (1928), 276 U. S. 252, 258, and is accepted by the text writers with apparent approval. See *Robertson and Kirkham, Jurisdiction of the Supreme Court of the U. S.*, section 48, p. 85; *Hughes Federal Practice*, secs. 3189, 3214 and 3216.

Clearly, the Court's intention was to provide its own rule for ascertaining compliance with the federal statute (Title 28, sec. 344, U. S. C.) in respect of the finality of state court judgments. The rule furnishes suitors a standard which they can apply with the definite assurance that dismissal will not result from uncertainties of the state law not exhibited upon the face of the record. The rule being one to minimize the loss of rights and consequent miscarriage of justice which often attend dismissals on account of procedural complexities, we submit that the rule is entitled to a liberal construction and application to effect its purpose.

Appellees' motion is entirely grounded upon the erroneous assumption that what constitutes a final judgment appealable under the federal statute is a question of state law, to be resolved solely by resort to the state decisions, without reference to the face of the record, and after the three months provided by Title 28, sec. 344, U. S. C. have elapsed. If appellees' motion is well grounded, then hereafter prospective appellants in most, if not all of the states, must proceed faced with the prospect of dismissal after expiration of the time to bring the case before this Court. As a result, alternative appeals or petitions for certiorari will be filed in respect of every state judgment in all cases which might be subject to the contention made by these ap-

pellees, thus needlessly increasing the cost to litigants and encumbering the docket of this Court.

We have searched diligently for instances where an appellee has shown or even asserted substantial injury or loss of his rights from the application of the rule in the Norfolk Turnpike case. We have found no such showing or claim. Appellees make none here. Since the Court of Civil Appeals is the only court empowered to issue mandate to enforce this judgment, and is the court possessed of the record, the Court can make effective and binding any judgment which it may enter pursuant to this appeal.

Appellant respectfully prays that the motion be denied, without consideration of the merit of the question of state law sought to be presented thereby, because the motion does not present a tenable ground for dismissal.

If the above prayer is denied, then appellant opposes the motion upon the following grounds:

1. The record clearly and affirmatively shows that the refusal to grant writ of error did not constitute a judgment or decision of the case by the Supreme Court of Texas, and that an appeal to this Court from the Supreme Court of Texas cannot be supported by the record.

2. The question of state law asserted by appellees is so utterly devoid of merit, or at least is so shrouded in doubt, as not to constitute a ground for dismissing this appeal.

Face of the Record.

Appellant's petition for writ of error was addressed to the Supreme Court of Texas (R. 793). Appellant therein—

> "* * * respectfully petitions this Honorable Court to issue its writ of error in this cause directed to the said Court of Civil Appeals to the end that this case may be removed from said Court to this Court, where the record and proceedings herein may be fully reviewed and the judgment of the Court of Civil Appeals rendered herein may be reversed and judgment rendered for this plaintiff in error, or else that the case may be remanded for a new trial; * * *" (R. 794)

This petition for writ of error was duly filed in the Court of Civil Appeals and sent by its Clerk, together with the record in the Court of Civil Appeals and the opinion, judgment, and orders of that Court, to the Clerk of the Supreme Court of Texas, where the writ of error proceeding was docketed as Application No. 21,776 (R. 792). The Supreme Court of Texas recorded its refusal of the application for writ of error in the following order:[6]

"Order Denying Writ of Error
Clerk's Office, Supreme Court of Texas
October 7, 1936.

App. No. 21776 — United Gas Public Service Co. v. The State of Texas, et al. (From Travis County, Third District)

This day came on to be heard the application of plaintiff in error for a writ of error to the Court

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[6]There is some confusion about whether the date of this order was October 6 or October 7, 1936. Only one such order was entered and that order is quoted above.

of Civil Appeals for the Third District and the same having been duly considered, it is ordered that the application be refused; that applicant, United Gas Public Service Company, pay all costs incurred herein.

(No opinion entered)" (R. 819)

The State Supreme Court recorded its overruling of the motion for rehearing of the application for writ of error by the following entry on the motion docket:

"Entry showing overruling of Motion for Rehearing.

IN THE SUPREME COURT OF TEXAS

United Gas Public Service Company
Mo. No. 12899 v. (From Travis County, Third District)
The State of Texas, et al.

December 30, 1936.

For rehearing of App. No. 21776. Overruled.
(No opinion entered)" (R. 828).

The following appears in the certificate of the Clerk of the Supreme Court of Texas:

"I further certify that on the 30th day of December, 1936, the record, statement of facts, briefs, and all other papers in said cause (except the petition for writ of error, the reply thereto, the motion for rehearing and the orders of the Court of Civil Appeals) were by me returned to Hon. R. E. Moore, the Clerk of the Court of Civil Appeals, for the Third Supreme Judicial District." (R. 835.)

See also the docket entry in the Court of Civil Appeals noting return of the record (R. 696).

The order of the Chief Justice of the Court of Civil Appeals declining to allow an appeal to this Court contains the following recital:

> "It appearing that, following this Court's denial of appellant's motion for rehearing on January 8, 1936, said cause has been pending on application for writ of error to the Supreme Court of Texas, which application was denied October 6, 1936, and motion for rehearing thereon overruled December 30, 1936. And it further appearing that the record in said cause has been returned to and is now in the possession of this Court of Civil Appeals and that this Court of Civil Appeals is the proper court to issue mandate herein, but that such mandate has not yet been issued." (R. 838)

See also section 1 of the Stipulation as to Record entered into by counsel for appellant and appellees (R. 1094), and the order of the Chief Justice of the Court of Civil Appeals entered pursuant to such stipulation (R. 1098-1099).

Nothing that was designated by appellees' counter-praecipe for record (R. 1068-1091), or by appellees' counter-designation for printing, is omitted from the record now before this Court.

It is worthy of note that the Clerk of the State Supreme Court did not proceed with the collection of the costs of the writ of error proceeding by presenting bill of costs to appellant, but certified such costs to the Clerk of the Court of Civil Appeals, the Court empowered to issue mandate and process for the collection of costs (R. 1101).

We believe that the above constitutes a complete showing of all parts of the record which have any bearing upon the character of action taken by the Supreme Court of Texas in this case.

The Record Shows Affirmatively and Conclusively That An Appeal from the Supreme Court of Texas Cannot Be Supported.

When the orders of the Supreme Court of Texas, taken by themselves or in conjunction with the remainder of the record, are tested by the rule in *Norfolk Turnpike Co. v. Virginia,* 225 U. S. at page 269, it is plain that the record will not support an appeal to this Court from the Supreme Court of Texas. We concluded before the appeal papers were prepared, and we still believe, that an appeal to this Court from the State Supreme Court would not only have been subject to motion to dismiss or affirm, as an appeal taken solely for delay, but that the docketing of two appeals, one from the Court of Civil Appeals and the other from the State Supreme Court, would have been so entirely lacking in good faith as to come dangerously close to an abuse of the Court's process. In view of the rule which the Court had provided to guide us, in view of the record and the established practice for over forty years, we could not have asserted doubt sufficiently substantial to justify an alternative appeal, although it would have saved the question appellees present now.

The Question of State Law Asserted by Appellees Is Either Wholly Devoid of Merit, or Too Doubtful to Support Their Motion.

Appellees rely on one case, *Gammel Statesman Pub. Co. v. Ben C. Jones & Co.*, 206 S. W. 931 (not officially reported). They assert that this is the only and the controlling decision in the State upon the legal effect

of refusal of a writ of error to a Court of Civil Appeals in a case where the State Supreme Court has the power of discretionary review.

Article V, sec. 2 of the Constitution of Texas begins:

> "The Supreme Court shall consist of a Chief Justice and two Associate Justices, any two of whom shall constitute a quorum, and the concurrence of two Judges shall be necessary to the decision of a case."

The remainder of this section relates to qualifications for office, salary, term of office and filling of vacancies, etc.

The Forty-First Texas Legislature enacted a statute authorizing the State Supreme Court to appoint a commission consisting of six commissioners, to assist the Supreme Court to dispose of its docket (Acts 1930, 41st Leg., 5th Called Session, Chap. 2, p. 112). This statute is now Article 1800a of the Revised Civil Statutes of Texas, 1925. Sec. 5 of the Article provides:

> "Two of said Commissioners designated by the Supreme Court acting with one member of the Supreme Court shall be authorized to pass upon all applications for writs of error presented from the Courts of Civil Appeals, and the action of said two Commissioners and one member of the Supreme Court in passing upon such applications shall be given the same force and effect as if the same were passed upon by the Supreme Court; provided, upon any application in which the three judges are not unanimous, the same shall be determined by the Supreme Court."

In *Gatz v. City of Kerrville* (1931), 121 Tex. 92, said Sec. 5 was attacked as being repugnant to Article V,

sec. 2 of the State Constitution, because it purported to authorize refusal of application for writ of error without the concurrence of two members of the Supreme Court. The claim was that the refusal of writ of error to the Court of Civil Appeals had the effect of making the judgment of the intermediate appellate court final in the courts of Texas, and constituted a decision and judgment of the case by the Supreme Court of Texas. The Supreme Court of Texas, per curiam, upheld the statute upon the authority of *San Antonio & A. P. Ry. v. Blair* (1917), 108 Tex. 434, 437-441, declaring the Texas law to be that refusal of application for writ of error is not a decision or judgment of the case by the Supreme Court of Texas, but is merely a refusal by that Court to take jurisdiction. The Court held that the power to limit appellate jurisdiction includes the power to provide means of making the limitation effective, and it is such means, and not the jurisdiction of the Supreme Court of Texas to decide a case (Art. V, sec. 2, Constitution of Texas), which are employed in refusing applications for writ of error.

In the Blair case, decided June 1917, 108 Tex. 434, 437-441, the validity of Chapter 76 of the Acts of 1917, Texas Legislature was upheld. The Act was attacked as repugnant to several sections of Article V, Constitution of Texas. This Act, as originally enacted and as recodified in 1925, is a part of appendix D, pages 38-42, appellees' motion. It was claimed that action in respect of applications for writ of error to the State Supreme Court was an exercise of the jurisdiction of that Court conferred by the State Constitution, which jurisdiction could not be exercised by or delegated through legisla-

tive enactment to Justices of the Courts of Civil Appeals. The Supreme Court of Texas, in an opinion by Chief Justice Phillips, pointed out the difference between the exercise of the Supreme Court's jurisdiction, namely, its power to hear and determine cases, and the performance of an act, pursuant to the power to limit jurisdiction, by which that jurisdiction would either be taken or declined. It was held in the Blair case that the constitutional provisions in respect of state appellate courts related to jurisdiction to decide and enter judgment in cases, and since that jurisdiction was not involved in passing upon applications for writ of error, the statutes in question were not repugnant to the State Constitution, 108 Tex. at pp. 440-441.

The Blair and Gatz cases, directly holding that denial of a writ of error is merely a refusal to take jurisdiction, seem absolutely conclusive to us. They are precisely in keeping with the declaration of the Texas legislature that the refusal or dismissal of an application for a writ of error shall have the effect of denying the admission of the case into the Supreme Court, Article 1750, Revised Civil Statutes of Texas, 1925. Taken with these two decisions, said Article is a legislative recognition of the character of the action taken in passing upon application for writ of error, as declared by the state court of last resort, and not a legislative attempt to make action upon such an application mean one thing when done by members of the Supreme Court, and something entirely different when performed by another designated agency (See appellees' argument, motion, pp. 15-17).

The applicable Texas statutes and court rules cannot

be reconciled with appellees' claim that denial of writ of error is a decision of the case and entry of judgment therein by the State Supreme Court. These statutes and rules are numerous and long and only the more pertinent of them will be summarized. Writ of error in this case, Art. 1728,[7] is not a matter of right, but is to be granted only if good cause be shown, Art. 1739. When petition for writ of error is duly filed in a Court of Civil Appeals, such petition, together with the original record in the Court of Civil Appeals is forwarded to the Clerk of the Supreme Court, Art. 1883. The timely filing of such a petition stays enforcement of the judgment of the Court of Civil Appeals by suspending issuance of mandate pending determination of the application, Art. 1864. The Clerk of the Supreme Court keeps three dockets, an application docket, a trial docket, and a motion docket, Rules 2, 8 and 13 (Tex. Sup.), 121 Tex. 747, 750. Application for writ of error is entered on the application docket and given an application number, which number is different from the number of a case which, by granting of the writ, has been admitted to the Supreme Court and to its trial docket for decision and judgment, Rules 2, 8 (Tex. Sup.), 121 Tex. 747, 750. The application is deemed submitted and ready for disposition after ten days after it is filed, and if the application is refused, the record of the Court of Civil Appeals is retained fifteen days. After fifteen days, if no motion for rehearing is filed, or after motion for rehearing is overruled, its original record is then returned to the Court of Civil Appeals,

[7]The reference to articles is to the Articles of the Revised Civil Statutes of Texas, 1925.

together with certified copies of the orders denying the application and overruling motion for rehearing, Rule 4 (Tex. Sup.), 121 Tex. 748. Then the Clerk of the Court of Civil Appeals is empowered to issue mandate, Art. 1864, Rule 66 (Tex. CCA.), 102 Tex. xxxvi, and, if need be, execution for costs. The time during which application for the writ has been pending is not included in computing the twelve months' time in which mandate is to issue, *Texas Co. v. Clark & Co.* (1922), 112 Tex. 74, 78-79.

Once the Supreme Court, by granting the writ, takes jurisdiction of a case, the procedure is entirely different, and the decision, judgment, mandate and execution for costs are the acts and process of the Supreme Court itself. In all cases decided by the Supreme Court, its judgments or decrees shall be pronounced in open court, Art. 1766. Article 1767 provides:

> "Whenever the Supreme Court shall affirm a judgment or decree of a Court of Civil Appeals, it shall render such judgment or decree as should have been rendered by the Court of Civil Appeals, and shall render judgment against the plaintiff in error and the sureties on his appeal or supersedeas bond, for the performance of said judgment or decree, and shall make such disposition as to the costs as they may order."

Article 1771 states how the Supreme Court shall exert its jurisdiction to decide a case:

> "In each case, the Supreme Court shall either affirm the judgment, or reverse and render such judgment as the Court of Civil Appeals should have rendered, or reverse the judgment and remand the case to the lower court, if it shall appear that the justice of the case demands another trial."

Where final judgment is rendered by the Supreme Court, the Clerk of that court issues mandate and is not authorized to deliver the mandate until he collects all costs both in the Supreme Court and the Court of Civil Appeals, Art. 1773, costs collected for the Court of Civil Appeals being remitted to its Clerk, Art. 1780. Where the judgment is by the Supreme Court, the Clerk of the Supreme Court is authorized to issue execution for the costs in both courts, Art. 1777.

A defendant in error may file a reply to the petition for writ of error. If he expressly waives the right to be heard in open court, the Supreme Court may decide the case on the petition and reply if it concludes that the writ should be granted. However, in such instances the case is put upon the trial docket, given a trial docket number, the Supreme Court pronounces the judgment of the case in open court and enters the same of record as in other cases, Rules 5 and 8 (Tex. Sup.), 121 Tex. 748, 750. If the right to be heard in open court is not waived, even though a reply is filed, then when the application is granted, writ of error actually issues to the Justices of the Court of Civil Appeals, citation is issued and served on the defendant in error, and if the case require a bond, the writ is not issued until the bond is approved and filed, Rule 5 (Tex. Sup.), 121 Tex. 748, 749. When the citation in error is served, the case is then transferred from the application docket to the trial docket and given a trial docket number, Rule 8 (Tex. Sup.), 121 Tex. 750. After the Supreme Court renders final judgment, the record and other papers cannot be taken from the Clerk's office, Rule 19 (Tex. Sup.), 121 Tex. 752.

The granting of writ of error is discretionary in every case. There is no writ as of right where a constitutional question is raised, thus differentiating the Texas procedure from that considered in the cases from Ohio cited by appellees (appellees' motion, pp. 4-5). It follows that when a writ of error is refused, at least one Supreme Court Justice and two Commissioners, or three designated Court of Civil Appeals Justices, have considered the application and the judgment below and have reached the conclusion such judgment and grounds therefor are correct; and when an application is dismissed (other than for failure to comply with essential requirements of procedure), this evidences a like conclusion that a correct judgment has been reached, although wrong grounds may have been stated therefor.[e] However, this does not mean that the Supreme Court of Texas has taken jurisdiction of the case and has exercised that jurisdiction by deciding the case and entering judgment on the merits. A judgment of affirmance by the Supreme Court of Texas, under the above rules and statutes, is pronounced in open court, the Supreme

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[e]This statement probably goes too far in spite of the statute, Art. 1728. As a matter of practice, only the errors assigned in the application are considered, and the application is denied if the assigned errors are believed not to require review. It is only when the application is granted that the whole case is reviewed, and then the assignments of plaintiff in error are considered in connection with any offsetting or compensating errors which the defendant in error has properly reserved, though not passed upon below. Bomar v. West (1894), 87 Tex. 299, 302; Holland v. Nimitz (1922), 111 Tex. 419, 432; Harris County v. Charlton (1922), 112 Tex. 19, 26. Thus, in passing upon the application, the only thing considered is whether the applicant has shown good cause for further appellate review; but when the application is granted, then the whole case as made in the Court of Civil Appeals is before the Supreme Court of Texas for complete review and judgment.

Court itself rendering the judgment that should have been rendered by the Court of Civil Appeals, with the disposition entered upon the trial docket and the judgment duly recorded, only the Clerk of the Supreme Court having power to issue mandate and execution for costs of both the intermediate and highest appellate courts. See Articles 1766, 1767, 1773, 1777, 1780 and Rule 8 (Tex. Sup.), supra. The record of such a case is then the record of and stays in the Supreme Court, Rule 19 (Tex. Sup.), 121 Tex. 751-752.

We understand appellees to contend that this appeal should be from the Supreme Court of Texas because the three Justices of that Court refused the application. The record does not show who acted, there is no requirement that the Justices or Commissioners who acted on the application be shown of record, and as a matter of practice, that fact is not recorded or known. The appellees' argument is beside the point. If refusal of writ of error is not an exercise of the jurisdiction of the Texas Supreme Court to decide the case, but is merely the employment of means provided to limit that jurisdiction (108 Tex. 434, 437-441, 121 Tex. 92, 93), appellees' contention could be true, and it still would not matter. Refusal of writ of error derives its character from the legal effect of what is done, and not from the position of those who do it. Refusal to take jurisdiction still remains a refusal to take jurisdiction, though the refusal is by those Justices who, if jurisdiction had been taken, would have then decided the case.

To make the appealable judgment depend on the ability of a prospective appellant to find out who passed on the application, a fact not of record, would lead to

hopeless confusion and intolerable results. Appellees' offer to move for a "supplemental opinion" of the Supreme Court of Texas (appellees' motion pp. 15-17) is not only confusing, as the Supreme Court of Texas has never entered an opinion in this case (R. 819, 828), but falls within the rule that certificates and communications of that kind are not available to aid a claim of jurisdiction which is not supported by the record, *Henkel v. Cincinnati*, 177 U. S. 170, 171; *Yazoo and Mississippi R'd Co. v. Adams*, 180 U. S. 41, 48; *Consolidated Turnpike Co. v. Norfolk &c Ry. Co.*, 228 U. S. 326, 334-335. The orders of the Supreme Court are not ambiguous or uncertain. Appellees cannot secure a dismissal of this appeal by importing into the record an opinion designed to make those orders the opposite of what they appear to be.[9]

It is well settled that the order of a state court of last resort refusing to entertain jurisdiction does not become an exercise of jurisdiction to decide the case or a judgment of affirmance because it writes an opinion stating that the judgment below is correct or giving the reasons for denying discretionary review. This Court took jurisdiction to review judgments of Texas Courts of Civil Appeals in two cases, *M. K. & T. Ry. Co. v. Texas*, 245 U. S. 484, and *G. H. & S. A. Ry. Co. v. Texas*, 246 U. S. 548, in each of which the Supreme Court of Texas, in refusing application for writ of

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[9]By asserting that such a "supplemental opinion" would not be available to appellees, we do not concede that such opinion could be obtained. Attempt to obtain it would require a motion, with notice to appellant. Such notice would give appellant the right to reply or be heard in opposition. The Supreme Court of Texas has never, within our knowledge, prejudged and given out its decision of the subject matter of a hearing in advance.

error, had written an opinion expressly approving the holding of the Courts of Civil Appeals. See 107 Tex. 540; 544. This is the rule generally. See *Western Union v. Crovo,* 220 U. S. 364, 366; *American Ry. Exp. Co. v. Levee,* 263 U. S. 19, 21; *Virginian Railway Co. v. Mullens,* 271 U. S. 220, 222.

Another pertinent inquiry is how, if the appeal here were from the action of the State Supreme Court refusing writ of error, the Court could make a judgment for appellant effective. If this Court should direct that the so-called judgment of the State Supreme Court be set aside, that would seem to require the State Court to grant application for writ of error. But the statutory time for any such application is now long past, there is no state statute under which the Clerk of the Court of Civil Appeals could be required to notice a second petition for writ of error if filed by appellant, or under which the Clerk of the Court of Civil Appeals could be required to transmit the record a second time to the Clerk of the Supreme Court of Texas. Under the writ of error procedure (now appeal), one of the controlling features in determining the proper state judgment for review has been what state court has possession of the record. See *Atherton v. Fowler,* 91 U. S. 143, 146, 147, *Hodges v. Snyder,* [illegible] U. S. 600, 601; *Radice v. New York,* 264 U. S. 292, 293.

In the *Gammel case,* 206 S. W. 931 (not officially reported), the judgment of the trial court had been affirmed by the Court of Civil Appeals and the Supreme Court of Texas had denied writ of error. The proceedings from that point were most unusual. The losing parties filed, and the Supreme Court of Texas refused,

an application for a mandamus requiring the Court of Civil Appeals to reopen the case. A similar application for mandamus was filed in respect of the trial court, and that application the State Supreme Court also refused. Having failed to obtain mandamus, the losing parties, directly contrary to the state statutes prescribing when motions for rehearing shall be filed and entertained by the Court of Civil Appeals, Art. 1641, Revised Civil Stats. of Texas, 1911, filed a series of such motions. The third motion, styled "supplemental motion for rehearing of motion to vacate judgment," was granted by the Court of Civil Appeals, the judgment of affirmance set aside, and the case remanded for new trial. The parties who had prevailed up to that time brought the case before the Supreme Court of Texas on writ of error. The Court held that the action of the Court of Civil Appeals in setting aside the judgment was void because contrary to the statute, supra. It was claimed that the Supreme Court was without jurisdiction and power to prevent injury from the void action of the Court of Civil Appeals. The language upon which appellees rely was used in response to that contention. Read without reference to the facts that were before the Court, the language gives some apparent support to appellees' contention. For some twenty years, the case has been considered as authority limited to the very rare combination of circumstances with which the Court was dealing, and not as announcing a rule of general application. This is in accord with the subsequent treatment of the case by the bench and bar of the State.[10] The probability that a court has announced a

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[10]In I. & G. N. Ry. Co. v. Anderson Co., judgment of the trial

broad general rule or precedent diminishes in direct proportion to the novelty of the situation which caused the controversy.

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[10] (*Continued*)

court was affirmed by the Court of Civil Appeals, 174 S. W. 305 (not officially reported), application for writ of error denied by the Supreme Court of Texas, and on error to the Court of Civil Appeals the judgment was affirmed by this Court, 246 U. S. 424. In City of Palestine v. City of Houston (1924), 262 S. W. 215 (not officially reported), the Court of Civil Appeals considered an application for writ of prohibition to restrain a subsequent suit upon the ground that, by seeking to relitigate a part of the subject matter of the former judgment, there was necessary interference with the enforcement of that former judgment, which had then become final. The question arose as to which appellate court of the State, the Court of Civil Appeals which had entered the judgment, or the Supreme Court of Texas which had refused application for writ of error, had jurisdiction and plenary power over the prior judgment so as to restrain interference with its enforcement. The Court of Civil Appeals held (262 S. W. 220) that its jurisdiction over the case was not lost, but its power to enforce the judgment merely suspended, during the pendency of the application of the writ of error, and that refusal of the application not only left its jurisdiction unimpaired, but gave the judgment an additional attribute of finality. The Court held that it, not the Supreme Court of Texas, had jurisdiction to enforce the judgment and to employ the means necessary thereto, including writ of prohibition.

The Supreme Court of Texas dismissed application for writ of error upon the ground that issuance of writs of prohibition by Courts of Civil Appeals to enforce their judgments was a matter in respect of which the jurisdiction of those Courts was final and not subject to discretionary review, City of Houston v. City of Palestine (1924), 114 Tex. 306, 313-314. Within the last few weeks the Supreme Court of Texas entered an order dismissing application for writ of error in Application No. 22410, Joe Edgar, plaintiff in error v. Stanolind Oil Company, et al, defendants in error, with the following endorsement: "Dismissed, because we are without jurisdiction, City of Palestine v. Houston, 262 S. W. 215."

The controversy in the Edgar case originally arose over an order of the Railroad Commission of Texas granting Edgar a permit to drill an oil well on a very small tract. The judgment of the lower court holding the order invalid was affirmed by the Court of Civil Appeals (90 S. W. (2d), 656) and the Texas Supreme Court refused application for writ of error. Thereafter,

Conclusion.

We submit that this motion, not being based on the record, does not present a tenable ground of dismissal. Examination of the record shows affirmatively and conclusively that the record would support no other appeal than the one we have taken. Appellees cannot secure a dismissal at this stage by importing into the case so-called supplemental opinions, or doubtful questions of state law. The question of state law which appellees seek to raise is so lacking in merit, and so far short of that clear and convincing showing required to overturn a practice that has been followed and upheld for forty years, that appellees ought not to prevail.

Appellant respectfully prays that the motion to dismiss be denied.

Dated: 24th day of April, 1937.

JOHN P. BULLINGTON,
F. G. COATES,
Counsel for Appellant,
United Gas Public Service Company.

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[10] (*Continued*)
the prevailing parties sought from the Court of Civil Appeals a writ of prohibition and injunction against Edgar and the members of the Railroad Commission on the ground that a second permit issued by the Railroad Commission to Edgar authorizing drilling of the tract now interfered with the enforcement of the judgment. Writ of prohibition was denied, upon the ground that the Commission's second order was void (98 S. W. (2d), 222). Edgar's petition for writ of error relied largely on the Gammel case to support the claim that the Court of Civil Appeals could not enlarge or amend its judgment after writ of error was refused, as this would deny the Supreme Court the power to control its judgment. As above shown, the petition was dismissed on the authority of the City of Palestine case, supra. (These proceedings are readily available to appellees, as the members of the Railroad Commission are appellees here and were parties in the Edgar case).